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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY ALLEN VARGAS, Defendant and Appellant.	E052566 (Super.Ct.No. SWF026712) **OPINION**

APPEAL from the Superior Court of Riverside County. John V. Stroud, Judge. (Retired judge of the Sacramento Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Lynne G. McGinnis and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

During an argument with a neighbor, defendant Anthony Allen Vargas shot the neighbor in the forehead. The victim survived but suffered brain damage. A jury found defendant guilty of:

Count 1: Unpremeditated attempted murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a)), with an enhancement for personally and intentionally discharging a firearm and causing great bodily injury (Pen. Code, § 12022.53, subd. (d)).

Count 2: Assault with a firearm (Pen. Code, § 245, subd. (a)(2)), with enhancements for personally using a firearm (Pen. Code, § 12022.5, subd. (a)) and for personally inflicting great bodily injury (Pen. Code, § 12022.7, subd. (a)).

Count 3: Unlawful possession of a firearm (Pen. Code, § 12021, subd. (a)(1)).

As a result, defendant was sentenced to a total of 34 years to life in prison (a determinate term of 9 years, plus an indeterminate term of 25 years to life), along with the usual fines and fees.

Defendant contends:

1. There was insufficient evidence of attempted murder, as opposed to attempted voluntary manslaughter.

2. The trial court erred by failing to instruct the jury sua sponte to view defendant's statements with caution.

We will hold that there was sufficient evidence of attempted murder. We will further hold that the trial court did err by failing to give a "view with caution" instruction; however, the error was not prejudicial. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *The Prosecution Case*.

Defendant lived in a trailer park in Lake Elsinore. His right side was paralyzed. He got around on an electric scooter.

The victim, Mason Fink, and Fink's girlfriend, Belinda Mayfield, also lived in the trailer park. Fink was always drunk. According to neighbors, he was "a loud, mean drunk[.]" "Everybody in the park had a problem with [Fink] . . . . [H]e was . . . usually calling out insults or just not being a very nice person."

Alicia Morris, yet another resident of the trailer park, had a friendly relationship with defendant. She was reluctant to testify; she felt that, by doing so, she was "betraying" defendant. Nevertheless, she admitted that she heard defendant say several times that he was going to "get" Fink.

On August 31, 2008, early in the day, defendant seemed "agitated." Morris asked him why, and once again, he said either "I'm going to get him" or "I'm going to get Mason."

That night, around 8:30 p.m., Fink wanted to barbecue some steaks; however, he was out of propane. He therefore set fire to some wood in a barbecue behind his home.

Several residents of the trailer park — including defendant, as well as John Teeter and 15-year old Isaac D. — noticed the fire and discussed it. The flames were only "[a]

couple [of] feet from the trees above." Defendant said, " . . . I'm going to go back there." Teeter and Isaac went with him.

Fink was visibly drunk. Defendant asked him politely to "turn off" or "turn . . . down" the fire. Fink asked why. Defendant pointed out some combustible materials nearby. Fink responded, "[F]uck no." He repeatedly told defendant to get off his property. They "bicker[ed] back and forth" for a couple of minutes.

Suddenly, defendant pulled out a gun and "wav[ed] it around." Fink said, "What are you going to do, fuckin[g] shoot me?" Defendant promptly shot him.

According to both Mayfield and Teeter, Fink did not "lunge" or move toward defendant. On direct, Isaac agreed. On cross, however, he remembered that Fink "took a step toward" defendant just before defendant shot him.[1]

The bullet struck Fink in the forehead. Part of it exited through the top of his head, but fragments remained in his brain. He was left with permanent brain damage. After the shooting, "[h]e didn't know where he was," and he "would wander off."

According to Mayfield, she grabbed defendant's hand in an attempt to get the gun away, but defendant held the gun up to her neck and said, "I'll kill you next."

Rebecca Bics, who lived across the street, heard what she thought was a firecracker and ran to the scene. She was "pretty intoxicated," having consumed some 18 beers over the course of the day. When she arrived, she saw defendant holding a gun up

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[1] Isaac had mentioned the step for the first time in an interview by the defense; he had not mentioned it in previous interviews by the prosecution.

to Mayfield's neck. She pulled defendant's hand away. Although she was not sure, she thought defendant said to her, "I'll shoot you[,] too." She told Mayfield to run. She also told defendant, "[J]ust go, get out of here."

Isaac had started to run, but defendant called to him, so he stopped.[2] Defendant handed him the gun and told him to get rid of it. Bics saw this, however, and immediately took the gun away.[3] Some neighbors, seeing her with the gun, thought she was the shooter. They started screaming and chasing her. She "panicked" and threw the gun in the lake. Eventually, she told the police where it was, and they recovered it. She pleaded guilty to tampering with evidence.

Shortly after the shooting, another neighbor, Sandra Enriquez, thought she heard defendant say, "I got him." He was mumbling, however, so she asked him, "[W]hat?" Initially, she testified that he only continued to mumble. However, when confronted with her statement to an investigator that she heard defendant repeat, "I got him," she agreed, "That's what really happened . . . ."

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[2] Isaac did not hear defendant threaten to shoot Mayfield.

[3] One eyewitness recalled seeing defendant hand the gun directly to Bics; however, the eyewitness agreed that she did not have a clear view and it was possible that defendant handed the gun to Isaac, who handed it to Bics.

A second eyewitness recalled seeing two or three "kids" trying but failing to grab the gun away from defendant before Bics grabbed it.

B. *The Defense Case*.

Jorge Martinez, defendant's doctor, testified that defendant suffered from seizures. He agreed that threatening to shoot someone who is trying to take a gun away from you would be inconsistent with a seizure. He also agreed that asking someone to hide or destroy evidence would be inconsistent with a seizure.

Virginia Silva, defendant's relative and former caretaker, testified that defendant had seizures "frequently," especially when he took a shower. He would "shak[e]" and "jiggle[e]." She would have to pry his hand off the safety bar.

David Black, who had been hired to give defendant showers, also testified that defendant had seizures. He would shake violently. He would hold onto the safety bar so tightly that Black had to pry his hand off.

Silva, Black, and a third acquaintance testified that defendant was not a violent person.

Defendant took the stand in his own defense. He testified that the manager of the trailer park had asked him to provide security and to enforce the trailer park's rules, in exchange for free utilities. He got the gun to protect himself after he had been robbed three or four times.

According to defendant, Fink was "belligerent"; Fink had cursed at him and flipped him off. However, he denied saying that he was going to "get" Fink.

Defendant testified that, during the argument, Fink took a step toward him, "like coming at me." Because he was afraid, he pulled out the gun. At that point, he "blacked

out." He did not remember the gun going off. He did not remember threatening Mayfield. The next thing he knew, a female voice was telling him to go home.

He admitted that, as he went home, he was no longer blacked out. Nevertheless, he did not remember how he got there. He did not remember saying, "I got him." He did not remember what happened to the gun.

Defendant claimed he was afraid that Fink would attack him, even though he, Teeter, and Isaac outnumbered Fink. He admitted that he could have just left, even when Fink stepped toward him. He also admitted that pulling out a gun was "an unreasonable amount of force . . . ."

II

THE SUFFICIENCY OF THE EVIDENCE TO PROVE ATTEMPTED MURDER RATHER THAN ATTEMPTED VOLUNTARY MANSLAUGHTER

Defendant contends that there was insufficient evidence that the shooting was attempted murder rather than attempted voluntary manslaughter.

Defendant filed a posttrial motion to modify the verdict (Pen. Code, § 1181, subd. 6) based on unreasonable self-defense (although not based on heat of passion). The trial court, however, denied the motion.

With or without a posttrial motion, our standard of review is the same: If there is sufficient evidence of the greater offense, we must affirm. (*People v. Thomas* (1945) 25 Cal.2d 880, 905.)

"When a defendant challenges the sufficiency of the evidence, '"[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' [Citations.] 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.]' [Citation.] We '"'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" [Citation.]' [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 942-943.) "When the circumstances reasonably justify the jury's findings, a reviewing court's opinion that the circumstances might also be reasonably reconciled with contrary findings does not warrant reversal of the judgment. [Citation.]" (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1069.)

A. *Heat of Passion.*

The People argue (without citing any authority) that defendant forfeited an argument based on a heat of passion theory by failing to raise this theory in his posttrial motion. They should know better. "[A]n argument that the evidence is insufficient to support a verdict is never waived. [Citations.]" (*People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1350, fn. 3 [Fourth Dist., Div. Two].)

"Voluntary manslaughter is a lesser included offense of murder. [Citation.] One form of the offense is defined as the unlawful killing of a human being without malice

aforethought 'upon a sudden quarrel or heat of passion.' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.)

"A heat of passion theory of manslaughter has both an objective and a subjective component. [Citations.]" (*People v. Moye* (2009) 47 Cal.4th 537, 549.) "To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by . . . provocation. [Citation.]" (*Id*. at p. 550.) To satisfy the objective element, "the requisite provocation must be one that would provoke an ordinarily reasonable person. [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 706.)

Here, according to Morris, defendant had previously declared his intention to "get" Fink. Defendant, for his part, merely claimed that he was blacked out when the shooting occurred. Thus, he essentially admitted that he did not act while subjectively under the influence of passion.

In addition, there was substantial evidence that there was no provocation. Defendant asked Fink to lower the fire; in response, Fink swore at him and told him to get off his property. An argument ensued, in which they both swore at each other. There was no other evidence of what Fink said.[4] This would not have caused an ordinary person of

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[4] We accept the testimony of the majority of the witnesses that there was indeed an argument. According to Mayfield's testimony, however, there was no argument at all. This alone was substantial evidence of lack of provocation.

Even according to Mayfield's earlier statements to the police, although there was a confrontation before the shooting, any provocation was all on defendant's side.

[footnote continued on next page]

average disposition to respond with deadly force. As defendant admitted, he could have just left; indeed, that was what Fink was asking him to do.

Defendant argues that Fink took a step toward him. However, there was substantial evidence to the contrary. Both Teeter and Mayfield denied this. Isaac, too, denied it (at least on direct and when interviewed by the prosecution). In any event, defendant admitted that he still could have just left. Moreover, Isaac and Teeter were there to protect him. The jury could reasonably find that the mere act of taking a step toward defendant was not legally sufficient provocation.

B. *Unreasonable Self-Defense*.

"[W]hen a defendant kills in the actual but unreasonable belief that he or she is in imminent danger of death or great bodily injury, the doctrine of 'imperfect self-defense' applies to reduce the killing from murder to voluntary manslaughter. [Citations.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 664.)

There was substantial evidence that defendant did not actually believe he was in danger. As already discussed, earlier in the day he had threatened to "get" Fink. While there was certainly evidence that Fink was "not . . . a very nice person," there was no evidence that he had ever been violent. Nor was there any evidence that, during the

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[footnote continued from previous page]
Defendant "yell[ed] . . . that the fire was too big and then mov[ed] on to how he considered Mr. Fink a nuisance to the complex, how he was going to ensure that Mr. Fink was kicked out of the mobile home park, et cetera." This, too, would be substantial evidence of lack of provocation.

argument, he threatened violence. He was not armed. Once again, Teeter and Isaac were present and presumably would have protected defendant. And again, defendant admitted that, even after Fink supposedly stepped toward him, he could have left.

There was also a separate reason to reject unreasonable self-defense. Defendant testified that he *drew* the gun in self-defense, but he did not claim that he *fired* it in self-defense. Rather, he claimed that he blacked out. "[I]mperfect self-defense has been held to apply only to a volitional shooting, not an accidental one. [Citation.]" (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355 [Fourth Dist., Div. Two].) The mere fact (if it is a fact) that defendant armed himself in self-defense would be insufficient. (*Id*. at pp. 1355-1357.) Arguably, the jury could have found, despite his denial, that he actually fired in self-defense. (See *People v. Wickersham* (1982) 32 Cal.3d 307, 328 ["[A]ppellant testified that the gun went off by accident in the midst of the struggle. This, however, does not preclude a jury determination that in fact appellant pulled the trigger out of fear"], disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201.) Defendant's own testimony, however, was sufficient evidence to support a contrary finding.[5]

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[5] The evidence suggests yet another reason to reject unreasonable self-defense: Arguably defendant, having refused Fink's repeated requests to get off his property, was a trespasser, and Fink was privileged to use reasonable force to eject him. (See *People v. Watie* (2002) 100 Cal.App.4th 866, 876-879.) The jury, however, was not instructed on this theory.

We therefore conclude that there was sufficient evidence to support defendant's conviction for attempted murder.

III

FAILURE TO INSTRUCT THE JURY

TO VIEW DEFENDANT'S STATEMENTS WITH CAUTION

Defendant contends that the trial court erred by failing to instruct the jury sua sponte to view his oral out-of-court statements with caution.

A. *Additional Factual and Procedural Background.*

Both the prosecution and the defense requested CALCRIM No. 358. After an unreported instructions conference, both sides indicated that they were "in agreement on the proposed instructions[.]"

Accordingly, the trial court gave the following portion of CALCRIM No. 358:

"You have heard evidence that the defendant made an oral or written statement before the trial. You must decide whether the defendant made such a statement in whole or in part. If you decide that the defendant made such a statement, consider the statement along with all the other evidence in reaching your verdict. It is up to you to decide how much importance to give to the statement."

However, it omitted the following bracketed portion of the instruction: "[Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]" (CALCRIM No. 358, 2009-2010 ed.)

B. *Discussion.*

"It is well established that the trial court must instruct the jury on its own motion that evidence of a defendant's unrecorded, out-of-court oral admissions should be viewed with caution. [Citations.]" (*People v. McKinnon* (2011) 52 Cal.4th 610, 679; see also Bench Notes to CALCRIM No. 358 (2009-2010 ed.) p. 132.) "The purpose of the cautionary language . . . is to assist the jury in determining whether the defendant ever made the admissions. [Citations.]" (*McKinnon*, at p. 679.)

Several witnesses testified to inculpatory out-of-court statements by defendant. Morris testified that defendant had repeatedly said, "I'm going to get [Fink]." Mayfield testified (and told others) that defendant told her, "I'll kill you next." Bics testified that defendant said, "I'll shoot you[,] too." Isaac testified that defendant gave him the gun and told him to get rid of it. Enriquez testified that, after the shooting, defendant said, "I got him." As the People concede, the trial court erred by failing to instruct the jury to view these statements with caution.

"In determining whether th[is particular] failure to instruct requires reversal, '[w]e apply the normal standard of review for state law error: whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given.' [Citations.]" (*People v. McKinnon, supra*, 52 Cal.4th at p. 679.) In light of this binding California Supreme Court authority, we reject defendant's contention that the higher federal constitutional standard of harmless error should apply.

"""Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. [Citations.]"' [Citation.] Th[e California Supreme C]ourt has held to be harmless the erroneous omission of the cautionary language when, in the absence of such conflict, a defendant simply denies that he made the statements. [Citation.] Further, when the trial court otherwise has thoroughly instructed the jury on assessing the credibility of witnesses, [it] ha[s] concluded the jury was adequately warned to view their testimony with caution. [Citation.]" (*People v. McKinnon*, *supra*, 52 Cal.4th at pp. 679-680.)

Here, the jury was otherwise fully instructed on how to evaluate the testimony of witnesses. It was given CALCRIM Nos. 226, 301, 302, and 316. Thus, much as in *People v. Dickey* (2005) 35 Cal.4th 884, 906 "[t]he jury was instructed on the significance of prior consistent or inconsistent statements of witnesses, discrepancies in a witness's testimony or between his or her testimony and that of others, witnesses who were willfully false in one material part of their testimony being distrusted in other parts, weighing conflicting testimony, evidence of the character of a witness for honesty and truthfulness to be considered in determining the witness's believability, and was given a general instruction on witness credibility that listed other factors to consider, including a witness's bias, interest or other motive, ability to remember the matter in question, and

admissions of untruthfulness." It was also instructed to "carefully review all the evidence" before concluding that the testimony of any one witness proved any fact. (CALCRIM No. 301.) Finally, it was instructed: "You have heard evidence of statements that a witness made before the trial. *If you decide that the witness made those statements,* you may use those statements . . . [¶] . . . [t]o evaluate whether the witness's testimony in court is believable[.]" (CALCRIM No. 318, italics added.)

Significantly, three of the five witnesses who testified to defendant's statements were strongly biased *toward* defendant. Morris felt fairly "close" to defendant; she "fe[lt] sick about having betrayed" him by testifying against him. She tried to play down his statements. She claimed that she was not sure whether he actually said, "I'm going to get Mason" or, more vaguely, "I'm going to get him." She admitted telling the police and the prosecutor, however, that defendant had used the name "Mason." She also admitted hearing him say "a couple [of] times before" that he was going to "get Mason." Finally, she admitted that her recollection at trial was that he said "Mason." Defendant, for his part, simply denied saying this.

Similarly, Bics and defendant were "[f]riends." She had told defendant to leave the crime scene, and she had pleaded guilty to tampering with evidence against him. When the police first interviewed her, she refused to identify defendant as the shooter. In the officer's view, she appeared to be trying to protect defendant. She, too, minimized defendant's statements. She testified, "I think he said, I'll shoot you, too, but I'm not sure. I had been drinking that night. So a lot is very blurry." "[H]e . . . said something, if

I recall right, it was something like I'll shoot you too, but I'm not sure what it really was. It happened too quick, you know." She added that she did not believe him and did not feel threatened. Once again, defendant merely countered with testimony that he was blacked out at the time when he supposedly made the statement.

Isaac was so close to defendant that he called him "grandpa." They were "good friends." He insisted that Fink took a step toward defendant, even though he had not mentioned this on direct or in previous interviews (until he was interviewed by the defense). Nevertheless, he admitted that defendant told him to get rid of the gun. Yet again, defendant simply denied remembering what he did with the gun.

With regard to these three witnesses, even if the jury had been properly instructed, it is practically inconceivable that it would have had any doubt as to whether defendant made the inculpatory statements. In addition, despite their efforts to protect him, the testimony of Morris and Isaac left little room for doubt about what he actually said. The same is not true of Bics; based on her testimony alone, a reasonable juror could have had a doubt about whether he said, "I'll shoot you, too." Mayfield, however, testified similarly that defendant said, "I'll kill you next" (albeit to her, not to Bics). Given this mutual corroboration, it seems indisputable that defendant made this remark to one, if not both, of the women.

We acknowledge that Mayfield was far less credible than Morris, Bics, or Isaac. She had every reason to be biased against defendant. Moreover, her recollection was evidently faulty. She insisted that defendant was right-handed and that he had the gun in

his right hand, even though his right side was paralyzed. Unlike every other eyewitness, she testified that there were no flames coming up from the fire. She testified that there was no argument before the shooting; she denied having made any contrary statements to the police. Also, she denied calling 911, even when confronted with a transcript of her call.

Even so, Mayfield had consistently reported defendant as saying, "I'll kill you next." She told this to a police officer on the night of the shooting. She also told this to neighbors on the same night. Once again, Mayfield and Bics corroborated each other on this point. And, once again, defendant could only testify that he was blacked out when he supposedly made this statement. Thus, it does not seem reasonably probable that a properly instructed jury would have rejected Mayfield's testimony that defendant, in fact, said this.

Enriquez, unlike the other four "earwitnesses," did not know defendant. Nevertheless, she, too, tried to downplay his statement. She had told the police that defendant mumbled something that sounded like, "I got him"; when she asked, "What?," defendant repeated, "I got him." At trial, she claimed that she was not sure what defendant said, even when he repeated it. When confronted with her statement to police, however, she agreed that "that time [she] did hear it." At a minimum, the jury would have believed that defendant said something twice that at least sounded like, "I got him."

We also repeat that, even assuming that a properly instructed jury might have disbelieved Mayfield and Enriquez, a proper instruction would not have made it any more

likely to disbelieve Morris, Bics, or Isaac. And defendant's statements, as reported by Morris, Bics, and Isaac, were inconsistent with his defense.

Last but not least, the defense evidence was relatively weak. Defendant was relying on (1) heat of passion, (2) reasonable self-defense, (3) unreasonable self-defense, or (4) unconsciousness. With regard to heat of passion, however, as discussed in part II, *ante*, there was little or no evidence of legally sufficient provocation. Similarly, with regard to self-defense, defendant did not testify that he intentionally fired the gun in self-defense. Finally, with regard to unconsciousness, defendant's statements to Morris, Bics, and Isaac indicated that he acted consciously and volitionally. And, as we have already concluded, the omitted instruction would not have affected the jury's consideration of these particular statements.

We therefore conclude that the error was harmless.

IV

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

MILLER
J.